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No. 05-416

IN THE

Supreme Court of the United States

JEANNE S. WOODFORD
AND ANTHONY P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court below properly declined to read a procedural default rule into the Prison Litigation Reform Act's exhaustion provision, 42 U.S.C. § 1997e(a), which states that a prisoner may not bring a federal action challenging prison conditions "until such administrative remedies as are available are exhausted" and makes no reference to procedural default.

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RESPONDENT'S BRIEF IN OPPOSITION

In this action under 42 U.S.C. § 1983, Respondent Viet Mike Ngo, seeking damages and equitable relief, alleges violations of his constitutional rights, principally in the form of restrictions preventing him from participating in religious, educational, and other prison programs. Reversing the district court, the Ninth Circuit properly declined to read a procedural default bar into the Prison Litigation Reform Act's ("PLRA") exhaustion provision (42 U.S.C. § 1997e(a)), and in particular declined to hold that Respondent had forever lost the right to pursue a federal civil rights action by virtue of having filed a prison grievance that prison administrators deemed to be outside the California prison system's 15-day deadline.

In so doing, the Ninth Circuit concededly deepened a circuit split on an important recurring question: whether the PLRA's exhaustion rule — that prisoners may not file suit "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) — incorporates an unwritten procedural default bar that permanently excludes from federal court claims rejected by prison administrators on procedural grounds. Five circuits (the Second, Third, Seventh, Tenth, and Eleventh) have held that the PLRA does incorporate such a bar, and two circuits (the Sixth and the court below) have held that there is no such bar. Respondent submits, however, that the time is not yet ripe for this Court's review, because five circuits have yet to address the issue and it would benefit from further percolation.

Furthermore, as explained in greater detail below, the Ninth Circuit's decision was correct on the merits.

Respondent notes that another pending petition for certiorari, from an Eleventh Circuit decision taking the majority side of the split, presents the same question as is at issue here. *See Johnson v. Meadows*, No. 05-6336. If this Court were to decide that, contrary to Respondent's contention, the issue is ripe for review. Respondent submits that his case is a better vehicle for addressing it than is *Johnson v. Meadows*. This case, unlike the *Johnson* case, presents the typical fact pattern — a prisoner files an untimely grievance, has it rejected, files suit in federal court, and faces the argument that he has defaulted his federal claim by failing to grieve in a timely fashion. In *Johnson*, in contrast, the prisoner made no effort to exhaust, bypassing the grievance process entirely; he availed himself of the grievance process only later, after the district court dismissed his initial suit. Moreover, the opinion below is more fully reasoned than the opinion in *Johnson*, which referred to the opposing authority only summarily.

STATEMENT

This case arises out of a series of events that began when Respondent Ngo was placed into administrative segregation at San Quentin State Prison in California on October 26, 2000, as punishment for alleged "inappropriate activity" with volunteer Catholic priests. Pet. App. 2.

On December 23, 2000, Ngo was released from administrative segregation, but Petitioner Kane, the Chief Deputy Warden, with the knowledge and approval of Petitioner Woodford, the Warden, prohibited him

from participating in any "Special Programs," including religious and educational programs, and from communicating with a particular volunteer in the San Quentin Catholic Chapel.

After an informal attempt to have the restrictions discontinued failed, Ngo submitted a formal appeal of this disciplinary action against him to the prison Appeals Coordinator. The Appeals Coordinator refused to accept it for filing on the ground that Ngo had not filed it within 15 days of "the event or decision being appealed," as required by California prison regulations. *Id.* at 3. The Appeals Coordinator also rejected, on the same grounds, a subsequent filing in which Ngo argued that his appeal was timely because the ongoing disciplinary action amounted to a series of continuing violations, the most recent of which had taken place less than 15 days before the filing date. *Id.*

On July 11, 2001, Ngo filed a verified complaint against Petitioners pursuant to 42 U.S.C. § 1983, alleging that Petitioners' conduct with respect to the disciplinary action and restrictions violated the First Amendment rights to free exercise of religion and free speech; denied him due process; and defamed him. Pet. App. 3. Ngo further alleged that he had exhausted all available administrative grievance procedures, noting that he had submitted two appeals but that the Appeals Coordinator had declared them untimely and refused to process them. *Id.* at 23.

Petitioners moved to dismiss the complaint, arguing, among other things, that Ngo's filing of the two grievances deemed untimely was insufficient to exhaust his administrative remedies in the prison grievance system, as required by the PLRA. *Id.* at 22. The District

Court granted the defendants' motion on failure-to-exhaust grounds. *Id.* at 25.

On appeal, Ngo argued that he had proceeded as far as he could go in the prison grievance system, and that the basis for the system's rejection of his claims — prison timeliness rules — was of no moment under the PLRA, which requires only that prison remedies be "exhausted." The Ninth Circuit (Pregerson, J.) agreed, expressly rejecting Petitioners' argument that, even though Ngo had no remaining remedies available in the prison grievance system, his allegedly untimely filing amounted to a failure to exhaust under the PLRA. The court reasoned that Petitioners' argument "confuses the doctrines of exhaustion and procedural default": Exhaustion, the Ninth Circuit explained, is a timing doctrine that merely "bars a remedy in federal court if one is still available in the state's administrative system," whereas procedural default permanently bars federal courts from considering claims that are procedurally barred in the state system. *Id.* at 9. The court then concluded that the PLRA contains only an exhaustion requirement, not a procedural default rule.

The Ninth Circuit recognized that the majority of circuits to address the issue have concluded that the PLRA should be read to include a procedural default rule, but — after carefully discussing the opinions of the Third, Sixth, Seventh, and Tenth Circuits, *id.* at 11-13 — aligned itself with the Sixth Circuit on the minority side of the circuit split. The court emphasized that whereas the plain language of the PLRA expressly requires exhaustion, nothing in the statute's language "mentions procedural default or indicates an intent to bar suits by prisoners who fail to meet administrative

time requirements." *Id.* at 15. The court also noted that the PLRA's use of the phrase "*until* such administrative remedies as are available are exhausted" indicated that Congress intended the exhaustion requirement as a *timing* rule (postponing a federal suit until the prisoner satisfied the exhaustion requirement), rather than as a complete bar to suit in federal court. *Id.* In addition, the court cited Ninth Circuit authority holding that "long-established differences between the exhaustion requirement and the procedural default doctrine preclude any conclusion that Congress implicitly intended to reach one by a statutory reference to the other." *Id.* at 18-19 (internal quotation marks omitted).

Furthermore, in addition to these arguments based on the language of the statute, the Ninth Circuit noted that engrafting a procedural default rule onto the PLRA's exhaustion requirement would have the effect of drastically reducing the limitations period for prisoner § 1983 actions. In California, the two-year § 1983 limitations period "would effectively shrink to fifteen working days" — the limit imposed in the prison grievance system. *Id.* at 20 & n.4. Moreover, allowing procedural defects to forever bar even meritorious claims would give prison administrators "an incentive to fashion grievance procedures which prevent or even defeat" such claims. *Id.* at 21. The court emphasized that the PLRA did not aim "simply to make things harder for inmates, irrespective of the merits of their claims." *Id.* at 20 n.4.

In declining to craft a procedural default rule, the Ninth Circuit rejected an analogy — relied upon by the circuits that have chosen to create such a rule — to the procedural default bar recognized in habeas corpus

cases, because "the reasons for utilizing procedural default doctrine in the habeas context are generally irrelevant to prisoner suits under the PLRA." *Id.* at 20. The court noted that the habeas procedural default rule "has its origins in the adequate and independent state ground doctrine," *id.* at 9, and in the fact that a habeas petition is a collateral attack on a state court judgment that may rest on such a ground. In this context, enforcing state procedural requirements is essential, because "the state criminal process should be the 'main event' rather than a 'tryout on the road' to a dispositive federal habeas hearing." *Id.* at 14 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Prisoners' § 1983 suits, in contrast, "do not collaterally attack a prison grievance proceeding," and it is the federal suit, not the grievance proceeding, that is the main event. Pet. App. 14. Moreover, unlike in habeas cases, where the procedural standards at issue are those of a state court system, "the standards governing suit in state or federal courts are not necessarily adhered to during prison grievance proceedings," and the proceedings "are not sufficiently judicial in nature to warrant preclusive effect at all." *Id.* at 15. The court ultimately determined that the PLRA requirement that plaintiffs exhaust prison administrative remedies is more similar to other administrative exhaustion requirements — where the Supreme Court has declined to "implant[]" a procedural default rule, *see, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988) — than it is to habeas exhaustion. Pet. App. 18-20.

Finally, the Ninth Circuit rejected the policy argument, advanced by Petitioners and other circuits, that the absence of a procedural default rule would defeat the exhaustion requirement's purpose of allowing

corrections officials to "take 'corrective action . . . [that] might improve prison administration and satisfy the inmate.'" *Id.* at 16 (ellipsis and brackets in original) (quoting *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002)). Prisoners are unlikely to intentionally default their grievances, because the grievance process represents "the fastest route to a remedy." Pet. App. 16. And, in any case, "the inmate must still submit his untimely grievance" in order to exhaust, and that submission satisfies the PLRA goal of "allowing prison officials first crack at resolving prisoners' grievances," should they choose to accept the opportunity to hear the case on the merits. *Id.* at 17.

Following the Ninth Circuit's decision, Petitioners sought rehearing and rehearing *en banc*, both of which were denied by order dated July 1, 2005. *Id.* at 27.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied. Respondent recognizes that the question presented is a significant one, and that there is a split on the issue that involves seven circuits. However, the split is of relatively recent vintage and five circuits have yet to decide the issue. For that reason, the question could benefit from further percolation. Further, the decision below is correct on the merits.

Respondent notes, however, that there is another pending petition presenting the same issue — *Johnson v. Meadows*, No. 05-6336, a case from the Eleventh Circuit. Should the Court determine that the issue is worthy of review at this time, Respondent submits that his case is a better vehicle for addressing the question than is *Johnson*. This case presents a more typical fact

pattern than *Johnson*, in which the petitioner filed suit before making any effort to file a grievance in the prison system. Moreover, the opinion below is more fully reasoned than the opinion in *Johnson*, which referred to the opposing authority only summarily.

I. THE QUESTION PRESENTED WOULD BENEFIT FROM FURTHER PERCOLATION.

Petitioners are correct that the federal courts of appeals are divided over the question whether "a procedural-default bar should be read into the Prison Litigation Reform Act's exhaustion requirement." Pet. 5. Indeed, the split is somewhat broader than Petitioners suggest. Besides the Sixth and Ninth Circuits, which have declined to read a procedural default requirement into the statute (*see Thomas v. Woolum*, 337 F.3d 720, 731-33 (6th Cir. 2003); Pet. App. 20-21) and the Third, Seventh, Tenth, and Eleventh Circuits, which have grafted a procedural default requirement onto the statute (*see Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Johnson v. Meadows*, 418 F.3d 1152, 1158-59 (11th Cir. 2005)), the Second Circuit has joined the majority side of the split (*see Giano v. Goord*, 380 F.3d 670, 677-78 (2d Cir. 2004)).

But, while the split is fairly broad, it is not fully mature. The first case addressing the question was *Pozo v. McCaughtry*, which the Seventh Circuit decided in April 2002. The Sixth Circuit parted company with the Seventh in July 2003 in *Thomas v. Woolum*. The split is thus only a little over two years old. Although seven circuits have taken positions on the issue, there remain five circuits (the First, Fourth, Fifth, Eighth, and D.C.

Circuits) that have yet to address it. Given the frequency with which the issue has been addressed since *Pozo* was decided in 2002, it seems likely that several of the remaining circuits will be presented with the issue in the near future.

Moreover, the courts on the majority side of the split have not fully worked out all of the consequences of the procedural default rule they have recognized — in particular, whether and how a procedural default might be excused. At least three courts have noted this additional question, but only the Second Circuit in *Giano* has gone on to address it. *See Pozo*, 286 F.3d at 1025 (reserving "the question whether plain-error review or other merits-linked doctrines that may relax procedural rules can relieve a defendant of a default in the state's process"); *Giano*, 380 F.3d at 677-80 (noting that "'[s]pecial circumstances' may exist that amount to a 'justification' for not complying with administrative procedural requirements"); Pet. App. 21 n.5 (observing that a procedural default doctrine would require development of a "standard of review" for determining whether the prison authorities had properly found a default). And even the Second Circuit declined to "attempt any broad statement of what constitutes justification" for failing to exhaust. *Giano*, 380 F.3d at 678. If further percolation were permitted, the circuits recognizing a procedural default rule might ameliorate the effects of that rule — and thereby reduce the consequences of the circuit split, and the need for this Court to address it — by adopting a relatively permissive standard for excusing such defaults.

Accordingly, the Court should deny certiorari in both this case and *Johnson v. Meadows*, which presents the same issue.

II. THE NINTH CIRCUIT WAS CORRECT ON THE MERITS OF THE QUESTION PRESENTED.

Petitioners are incorrect in suggesting that this Court should grant review to correct the Ninth Circuit's purportedly erroneous ruling in this case. The Ninth Circuit was correct in concluding that it would be inappropriate to add a judicially created procedural default rule to the PLRA's exhaustion requirement.

Most importantly, there is nothing in the plain language of the PLRA to support such a rule. Under the PLRA, "[n]o action shall be brought with respect to prison conditions . . . by a prisoner confined in any . . . correctional facility *until such administrative remedies as are available are exhausted.*" 42 U.S.C. § 1997e(a) (emphasis added). The PLRA thus specifically creates an exhaustion requirement, and conspicuously fails to create a procedural default bar. Indeed, Petitioners recognize that what they seek is the judicial creation of a rule that cannot be found in the language of the statute — as they say at more than one point in the petition, what they are asking this Court to do is "read [a procedural default bar] into the Prison Litigation Reform Act's exhaustion requirement." Pet. 5; *see also id.* at 6 ("[T]he Sixth and Ninth Circuits have declined to read a procedural-default mechanism into the Prison Litigation Reform Act."). Petitioners cite no authority for the proposition that the courts may add procedural hurdles to § 1983 above and beyond what Congress chose to impose.

Nor is there any basis for arguing that Congress failed to mention procedural default because it intended the term "exhausted" to incorporate, *sub silentio*, a procedural default rule. It is well-established that "[e]xhaustion and procedural default are distinct concepts .... The two doctrines developed independently and on different grounds, apply in different situations, and lead to different consequences." *Franklin v. Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002); *see, e.g., Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982); *Jackson v. Johnson*, 194 F.3d 641, 652 n.35 (5th Cir. 1999).[1] In light of this well-established distinction, it is clear that Congress intended its use of the term "exhausted" to mean just that — exhaustion, not procedural default. See *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents.").

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[1] Exhaustion refers to a requirement that the claimant use all available state remedies, a requirement that is satisfied once no further state remedies are available — no matter what caused the remedies to be unavailable. For example, in the habeas corpus context, the exhaustion requirement is satisfied — and does not bar a claim — when state courts reject the claim for failure to satisfy state procedural requirements. As this Court has explained, "[b]ecause this [exhaustion] requirement ... refers only to remedies still available at the time of the federal petition, it is satisfied if it is clear that the habeas petitioner's claims are now procedurally barred under state law." *Gray v. Netherland*, 518 U.S. 152, 161 (1996) (internal quotation and brackets omitted). The procedural default doctrine, in contrast, does bar claims that have been defaulted for failure to satisfy state procedural requirements, such as timeliness requirements. *Id.* at 162.

Moreover, as the Sixth Circuit observed in *Thomas v. Woolum*, had Congress desired to incorporate a procedural default rule, it could easily have done so:

> With the PLRA, Congress could have required more than an exhaustion requirement, but it chose not to. Congress could have, for example, required in § 1997e(a) that, "In exhausting available administrative remedies, the prisoner shall comply with the prison's reasonable time limits for filing grievances. Untimely claims shall be deemed procedurally defaulted."

337 F.3d at 731. Likewise, Congress could easily have required that prisoner claims be "*properly* exhausted," but chose not to do so. *See, e.g.*, 28 U.S.C. § 2244(d)(2) (expressly providing that tolling provision applies only during the pendency of a "properly filed" application for state relief); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979) (declining, in the absence of any reference to timeliness in the statute, to import a timeliness requirement into Age Discrimination in Employment Act provision requiring presentation of grievances to state agency before filing federal suit); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988) (same result under Title VII: "Title VII, like the ADEA, contains no express reference to timeliness under state law").

Instead of addressing the plain language of the PLRA, Petitioners argue that the Ninth Circuit's decision is somehow inconsistent with this Court's two opinions rejecting proposed exceptions to the PLRA exhaustion requirement — *Booth v. Churner*, 532 U.S. 731 (2001) (no futility exception), and *Porter v. Nussle*, 534 U.S. 516 (2002) (no exception for incidents affecting "only

particular prisoners" rather than "prisoners generally"). Pet. 6-9. However, the decision below had nothing to do with creating an exception to the exhaustion requirement,[2] and neither *Booth* nor *Porter* says anything about a procedural default rule. Indeed, both cases, if anything, support Respondent's position, because both rely on requirements set forth in the express language of the PLRA. *See Booth*, 532 U.S. at 738-40; *Porter*, 534 U.S. at 528. Here, the procedural default mechanism the defendants seek is contained nowhere in the plain language of the PLRA.

Nor can Petitioners find support in this Court's creation of a procedural default rule in the habeas context. In the habeas context, unlike here, the requirements of the cause of action were largely developed by the courts without specific statutory guidance. Here, in contrast, there is a statute in which Congress has specifically prescribed what procedural hurdles the prisoner must satisfy — to wit, exhaustion *simpliciter* — and nothing indicating a delegation of authority to the courts to add additional requirements.

Moreover, even if that were not the case, the Ninth Circuit was correct in recognizing that the basis for the habeas procedural default rule has no application here. In habeas cases, which are collateral attacks on state court judgments, the rule "has its historical and theoretical basis in the 'adequate and independent state

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[2] The Ninth Circuit, far from relying on an exception to the exhaustion requirement, expressly found that "Ngo *exhausted* all administrative remedies available to him . . . when he completed all avenues of administrative review available to him." Pet. App. 21 (emphasis added).

ground' doctrine." *Harris v. Reed*, 489 U.S. 255, 260 (1989)); *accord Lee v. Kemna*, 534 U.S. 362, 375 (2002). That doctrine is important in habeas cases because it helps to ensure — by requiring criminal defendants to properly present all of their claims in the state courts, on pain of procedural default — that it is the state-court trial that is (as it is supposed to be) "the 'main event,' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). Applying that doctrine also helps to prevent the anomalous result that "a federal district court or court of appeals would be able to review claims that [the Supreme Court] would have been unable to consider on direct review." *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991)).

None of these considerations applies in the PLRA context. A suit by a prisoner pursuant to § 1983 is not an attack on a state judgment, and accordingly there is no concern that the federal court is reviewing a judgment that rests on an adequate and independent state ground and/or would not have been reviewable on direct review. Moreover, it is quite clear that under the PLRA, the prison administrative process that must be exhausted is not designed to be the "main event," and the § 1983 action a mere review of that determination. It is the § 1983 action — the *federal* suit — that is the main event, and it is entirely independent of the prison grievance proceedings: as the Ninth Circuit noted, the "[p]rison grievance proceedings are not sufficiently judicial in nature to warrant preclusive effect." Pet. App. 15. In short, the reasons that compelled the creation of a

procedural default doctrine in habeas law have no application to the PLRA.

Finally, Petitioners' policy argument — that the PLRA exhaustion requirement will be rendered meaningless if prisoners are permitted to "'exhaust' administrative remedies by disregarding them." Pet. 8 — does not withstand scrutiny. As an initial matter, a prisoner has no strategic incentive to "disregard[]" the prison grievance process, because the result of that process, unlike a state-court ruling in the habeas context (*see* 28 U.S.C. § 2254(d)(1)), receives no deference in and has no effect on the subsequent § 1983 suit. *See* Pet. App. 15; *see also* Kermit Roosevelt III, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, 1810 (2003) ("Withholding a claim or sandbagging in the administrative proceeding offers inmates no strategic benefit.").

In any event, even an inmate who for some reason *wants* to evade the administrative process does not have it in his power to do so; the exhaustion requirement means that even an untimely prisoner must still file his grievance before proceeding to court, and prison officials are thereby given, if they want it, what is important under the PLRA: the "*opportunity* to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. at 525 (emphasis added). For example, in this case, under Cal. Code Regs. tit. 15, § 3084.3(c), "the Appeals Coordinator *could* have considered Ngo's appeal: [h]e

was authorized to do so by the grievance regulations, but elected not to." Pet. App. 17 (emphasis in original).[3]

Moreover, significant policy concerns cut *against* judicially creating a procedural default rule. As the Ninth Circuit recognized, the short prison administrative deadlines in California (as in many states) would effectively impose a 15-working-day statute of limitations on prisoners' § 1983 actions, instead of the longer limitations periods that normally apply. This would necessarily result in the non-merits forfeiture of many claims, particularly in view of the fact that inmates navigating the administrative grievance process are almost inevitably proceeding without the guidance of counsel. There is no indication that Congress intended the PLRA to result in such a wholesale forfeiture of claims. Pet. App. 19-20. Had that been Congress's intent, it could have directly imposed a draconian statute of limitations on prisoner suits.[4]

The creation of a procedural default rule would also create a perverse incentive for prison officials (who are potential defendants) to defeat § 1983 claims by making procedural requirements as onerous as possible. *See Thomas v. Woolum*, 337 F.3d at 729 n.3 (such "incentives . . . would likely lead to shorter and shorter

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[3] The same discretion is available under most, if not all, state prison grievance systems. *See* Roosevelt, *supra*, at 1810.

[4] Moreover, the inmates most likely to fall into procedural error are first-time litigants, who are *least* likely to file the frivolous claims about which Congress was concerned. More litigious inmates will have greater knowledge of the system and be much more likely to satisfy procedural requirements. *Cf.* Pet. App. 29 (scheme "would penalize the less sophisticated and less informed").

limitations periods"). Inmates' rights under § 1983 would become subject to any procedural requirement administrators choose to insist on, no matter how arbitrary or unfair. Again, there is no indication that Congress intended to create any such regime.

In sum, it is clear that Congress's statutory imposition of an exhaustion requirement does not, *sub silentio*, create a procedural default rule: that the reasons for the procedural default doctrine in habeas corpus do not apply to the PLRA; and that the absence of a procedural default provision does not even remotely render the PLRA exhaustion requirement "meaningless."

III. IF, HOWEVER, THE COURT DECIDES THAT THE QUESTION PRESENTED MERITS REVIEW, THIS CASE PRESENTS THE BEST VEHICLE.

If this Court determines, contrary to Respondent's contention, that the question presented is ripe for this Court's review, Respondent submits that his case is the appropriate vehicle for that review. There is another pending petition that presents the same question — *Johnson v. Meadows*, No. 05-6336, which arises from *Johnson v. Meadows*, 418 F.3d 1152 (11th Cir. 2005), a decision on the majority side of the circuit split — but that case is not as suitable a vehicle.

One important distinction is that this case presents what might be called the ordinary factual situation. Respondent attempted to file prison grievances before proceeding to federal court, and filed his § 1983 action only after the prison Appeals Coordinator rejected those grievances. Pet. App. 3. In the *Johnson* case, the prisoner filed his first federal lawsuit without even attempting to avail himself of the prison grievance

system. 418 F.3d at 1154. He attempted to exhaust only after the district court dismissed his complaint for bypassing the prison grievance system. *Id.*

This distinction is significant, because it is possible that the Court could conclude that the *Johnson* petitioner's complete bypass of administrative remedies before filing his first lawsuit — a true failure to exhaustion — should have resulted in a dismissal with prejudice.[5] In that event, the Court might not reach the question presented. In this case, in contrast, the facts inescapably present the question whether a procedural default requirement should be read into the PLRA.

Moreover, the Ninth Circuit's opinion below addresses and discusses the reasoning of the case law on

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[5] It is worth noting that this bypass contradicts the *Johnson* petition's contention that that case presents the Court with a unique opportunity to address what it calls a separate "'good faith exhaustion' rule advanced by the Second Circuit." Petition for Certiorari at 19-20, *Johnson v. Meadows*, No. 05-6336. As an initial matter, the Second Circuit's position on the question presented here is no different from the position of the Third, Seventh, Tenth, and Eleventh Circuits: As indicated earlier, *supra* at 8-9, the Second Circuit reads the PLRA as including a procedural default rule, and its discussion of good faith justification for failing to exhaust relates only to the further question of when a failure to exhaust will be excused. *See, e.g., Johnson*, 418 F.3d at 1158 (citing Second Circuit opinion in *Giano v. Goord* as one of the cases recognizing procedural default rule).

In any event, Johnson's complete bypass of the prison grievance system is inconsistent with good faith, and the Eleventh Circuit specifically found that his failure to exhaust was "without good cause." 418 F.3d at 1159. If anything, it is Respondent's case that reflects a good-faith effort to comply with the prison grievance system, as the Ninth Circuit found that "Ngo gave the prison grievance process a chance to work; indeed, it's debatable whether his appeal was even untimely." Pet. App. 17.

both sides of the circuit split. Pet. App. 11-13, and thereby provides a fully-considered opinion for review. The Ninth Circuit also considered, and denied, *en banc* review. In contrast, the Eleventh Circuit's opinion in *Johnson* relegates the opposing authority to a brief "but see" citation. 418 F.3d at 1158, and the full court was never asked to consider *en banc* review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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